



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE

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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
City of Virginia Beach
FOR
Seaboard Road Improvement Project
Permit No. WP3-03-1713**

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and the City of Virginia Beach, regarding the Seaboard Road Improvement Project, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "City" means the City of Virginia Beach, a political subdivision of the Commonwealth of Virginia. The City is a "person" within the meaning of Va. Code § 10.1-1184 and 62.1-44.7.
3. "Compensation" or "Compensatory Mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resources.
4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
7. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
8. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
12. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
13. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

14. "Property" means the City Seaboard Road Improvement Project, near the intersection of Seaboard Road and Princess Anne Road, Virginia Beach, Virginia.
15. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
16. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
17. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
18. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
19. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
20. "USACE" means the United States Army Corps of Engineers.
21. "Va. Code" means the Code of Virginia (1950), as amended.
22. "VAC" means the Virginia Administrative Code.
23. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. DEQ issued General Permit Authorization Number WP3-03-1713 which authorized the City of Virginia Beach to impact 0.46 acres of forested wetlands and 0.67 acres of scrub-shrub wetlands to widen and extend the existing Seaboard Road. The original permit expiration date was November 2, 2008; however by application by the City, DEQ issued two continuations of the permit coverage which ultimately extended the permit expiration date to November 2, 2013.
2. On November 2, 2013, DEQ a consultant for the City reported that the City had apparently cleared, graded, upgraded utility lines, and added fill resulting in unauthorized impacts at the Property. Reportedly, the Property is in the vicinity of a "paper" street known as Cason Avenue, and while conducting utility work at the permitted impact site,

the City decided to extend utilities onto Cason Avenue, resulting in the unauthorized impacts. Reportedly, the City has no current plans to construct Cason Avenue.

3. A review of DEQ files indicated that a DEQ Permit had not been issued nor had the USACE issued a permit authorizing the impacts at the Property.
4. On February 25, 2014, DEQ staff visited the Property and observed the unauthorized impacts. During the Property visit a representative of the City stated that the area had been impacted for the installation of water and sewer utility lines during June 2013.
5. Based upon available information and Property observations, approximately 4,000 square feet (0.09 acres) of unauthorized forested wetland impacts had occurred at the Property.
6. A review of DEQ files indicated that the City failed to submit post-construction photographs within one week after completion of construction, which was required by the Permit Part II.D.1. and Part II.E.3.
7. A review of DEQ files indicated that the City failed to submit a notice of termination within 30 days of final completion, which was required by the Permit Part II.E.5.
8. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit the excavation, filling or dumping, or new activities to cause draining or that otherwise significantly alters or degrades existing wetland acreage of function except in compliance with a permit. The City did not have a Permit for the above activities.
9. On June 21, 2014, DEQ issued a NOV for the violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.
10. Based on the report of the consultant on November 2, 2013 and DEQ staff observations on February 25, 2014, the Board concludes that the City has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraphs C(2) through C(7), above.
11. In order for the City to return to compliance, DEQ staff and representatives of the City have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders the City, and the City agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$7,438.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

The City shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, the City shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of the City for good cause shown by the City, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in the NOV dated July 21, 2014. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, the City admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. The City consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. The City declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by the City to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
 8. The City shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. The City shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. The City shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.
- Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.
9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
 10. This Order shall become effective upon execution by both the Director or his designee and the City. Nevertheless, the City agrees to be bound by any compliance date which precedes the effective date of this Order.
 11. This Order shall continue in effect until:
 - a. The Director or his designee terminates the Order after the City has completed all of the requirements of the Order;
 - b. The City petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to the City.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the City from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by the City and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of the City certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind the City to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of the City.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, the City voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2014.

Maria R. Nold, Regional Director
Department of Environmental Quality

The City of Virginia Beach voluntarily agrees to the issuance of this Order.

Date: 10.9.14 By: [Signature] Deputy City Manager
(Person) (Title)
The City of Virginia Beach

Commonwealth of Virginia
City/County of Virginia Beach

The foregoing document was signed and acknowledged before me this 10th day of October, 20 14, by David Hansen who is

Deputy City Manager of the City of Virginia Beach, on behalf of the City.
[Signature]

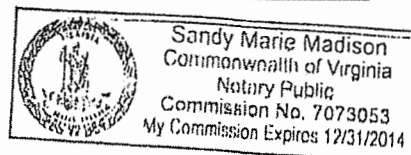
Notary Public

7073053

Registration No.

My commission expires: 12.31.14

Notary seal:



APPENDIX A SCHEDULE OF COMPLIANCE

The City shall:

1. By November 1, 2014, submit to DEQ for review and approval an approvable Corrective Action Plan and Schedule ("CAP") to include:
 - i. purchase of 2:1 mitigation credits for the impacts without restoration and monitoring;
 - ii. a feasibility plan of leaving in place the utilities from the impacted area on the Property.
2. Implement the CAP within 30 days of approval by DEQ.
3. Mail all submittals and reports required by this Appendix A to:

Regional Director
DEQ, Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462